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90-78

Supreme Court, U.S.
FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

Supreme Court of the United States of America

Term: October, 1989

State of Louisiana
(Through The Department of Revenue and Taxation)

Versus

The Adobe Western & Casual, Inc.

Petition for Writ of Certiorari

On Review from
The Honorable Supreme Court
of The State of Louisiana

Requested by Defendant, The Adobe Western & Casual, Inc.

J. DAVID BOURLAND
Attorney for Petitioner
The Adobe Western &
Casual, Inc.
Bar Roll Number: 3327
11017 Perkins Rd., Ste. C
Baton Rouge, LA 70810
Telephone: 504-767-0312

A.

Questions Presented for Review

1. Whether the 1st Circuit Court of Appeals of Louisiana incorrectly applied the totality of circumstance test:

   a. Whether the hearsay information considered by the appeal court to uphold the search warrant sprang from a corroboration or a setting providing a substantial basis for crediting it, and whether it set forth any underlying circumstance regarding the informant's ability to know.

   b. Whether the civil tax audit by the State of Louisiana, Department of Revenue and Taxation, yielded any information consistent with or corroborative of the alleged informant's tip.

   c. Whether there was a sufficient articulation of the alleged informant's veracity, reliability, and basis of knowledge to sustain an application of relevancy under the totality of circumstances to support a favorable probable cause determination.

   d. Whether there was any portion of the search warrant sufficiently particularized to pass constitutional muster.

2. Whether the search warrant constituted an

impermissibly general description of the property to be seized, allowing unfettered discretion by the seizing authority.

B.

Listing of Parties

1. State of Louisiana
(through the Department of Revenue and Taxation)
DOUGLAS F. HERBERT
Attorney for the Secretary of Revenue and Taxation
Legal Division
330 N. Ardenwood Drive
P.O. Box 4064
Baton Rouge, LA 70821-4064
Telephone: 504-925-7630

2. The Adobe Western & Casual, Inc.
(Petitioner)
J. DAVID BOURLAND
Attorney for Petitioner
Bar Roll Number: 3327
11017 Perkins Rd., Ste. C
Baton Rouge, LA 70810
Telephone: 504-767-0312

C.

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E.

Statement of Jurisdiction

1. This matter arises from a finding by the 19th Judicial District Court of Louisiana, in a criminal proceeding, of a trial court of general jurisdiction, holding the subject search warrant totally defective and in violation of the 4th Amendment of the Constitution of the United States and Article 1, §5 of the Constitution of the State of Louisiana. The 1st Circuit Court of Appeal for the State of Louisiana granted the Supervisory Writ applied for by the State of Louisiana, vacating the ruling of the trial court. Application for Writ of Certiorari and/or Review was made by the petitioner/appellant herein, to the Supreme Court of Louisiana, which was denied, 5-1, under docket number 90-KK-0319.

2. The judgment in the criminal case was rendered in the Louisiana Supreme Court, a state court of last resort, on March 30, 1990. Notice

of Writ of Certiorari to the Supreme Court of the United States was filed on May 1, 1990, in the Supreme Court of Louisiana.

3. The statutory provision which confers jurisdiction on the Court to review the decree in question by Writ of Certiorari is 28 U.S.C.A. §1257(a).

F.

Law Involved

1. U.S. Const. amend. IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. U.S. Const. amend. XIV:

> "... No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws. ..."

3. La. Const. art 1, §5:

"Section 5. Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizure, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court."

4. LSA-C.Cr.P. art. 162:

"A search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for the issuance of the warrant."

"A search warrant shall particularly describe the person or place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search or seizure.

5. LSA-R.S. 47:1641:

"Any person required under this subtitle to collect, account for, or pay over any tax, penality, or interest imposed by this subtitle, who wilfully fails to collect or truthfully account for or pay over such tax, penalty, or interest, shall in

addition to other penalties provided by law, be fined not more that ten thousand dollars or imprisoned, with or without hard labor, for not more than five years, or both."

6. LSA-R.S. 47:1642:

"Any person who willfully fails to file any return or report required by to be filed by the provisions of this Sub-title, or who wilfully files or causes to be filed, with the collector, any false or fraudulent returns, report or statement, or who wilfully aids or abets another in the filing with the collector of any false or fraudulent return, report or statement, with the intent to defraud the state or evade the payment of any tax, fee, penalty or interest, or any part thereof, which shall be due pursuant to the provisions of this Sub-title, shall be fined not more than one thousand dollars ($1,000.00) or imprisoned for not more than one year, or both."

G.

Statement of the Case

On September 5, 1989, agents of the Criminal Investigation Division of the Louisiana Department of Revenue and Taxation executed a search warrant at the business of the petitioner, The Adobe Western & Casual, Inc., in Baton Rouge, Louisiana. (Please see Appendix

#1.) Prior to issuance and service of that warrant, the Department of Revenue and Taxation, Civil Division, had been on the premises of the taxpayer for approximately five (5) months, auditing Adobe's records. The State had full access to any and all records of the petitioner concerning its business transactions, and were permitted by the petitioner to use the facilities, as requested, to facilitate the audit. The petitioner had cooperated fully with the audit to that point.

Further, the petitioner met with the State's auditors, through its president, on several occasions, the last being only a day or so prior to the issuance of the search warrant, at the State's request, to discuss tentative audit findings. The petitioner, as is supported by the transcript of the trial court proceeding, was able to discount and correct many areas of the auditors' initial findings, and show where such were erroneous. However, as the petitioner further testified, through its president at the

trial court hearing, the auditors failed and refused to correct the records, rather using the inaccurate information as a part of the affidavit in support of the search warrant application. Further, as the trial court record supports, the State did not contradict such errors in their audit which were pointed out to them at the meeting just prior to the issuance of the search warrant, and that it failed to make corrections in that regard prior to requesting the search warrant and using inaccurate information to support it.

The petitioner's position before all lower courts, has been and continues to be, the affidavit purportedly supporting the search warrant in this matter, does not contain any portion sufficient to pass constitutional muster and that total suppression of all evidence seized is required. The probable cause statement of the affidavit, basically, is in two parts. The first is contained exclusively in the first paragraph, the other totally in the

second paragraph of that portion of the affidavit.

The first part of support for probable cause centers entirely on the hearsay of an alleged confidential informant, which does not contain any articulation, under the "totality of circumstances analysis," concerning the informant's veracity, facts relating to the informant's basis of knowledge or corroboration of the informant's information.

The second portion of the affidavit attributed to alleged probable cause, constitutes blanket statements of alleged findings by the State's civil tax auditors, but does not make any assertion, articulation or insinuation of a past, current, or possible future, violation of any criminal statute. There is no averment of wilful failure to pay any tax or to evade taxation and absolutely no allegation of any criminal wrongdoing, whatsoever.

Thus, the facts demonstrate the constitutional lackings of the first probable cause paragraph of the affidavit are not supported by a permissible basis, are not indicative of any criminal violation, and are not made usable or bolstered by the averments continued in the second one. The two, separately, cannot substantiate constitutional requirements for issuance of a valid search warrant, and jointly, even under the totality of the circumstances, do not meet elemental constitutional standards. Even considered together, the affidavit is not sufficiently particularized to support a proper probable cause finding.

Additionally, as is supported by the transcript of the trial court proceeding, the criminal investigator testifying on behalf of the State, called as a witness for the State, verified that other portions of the material contained in the affidavit of probable cause; i.e., the purported information supplied by the

alleged confidential informant, was given to her many months prior to the issuance of the search warrant and before commencement of the civil audit. Further, such information had not been acted upon at that time because the State was unsure as to the veracity and reliability of the information from the undisclosed C.I. However, in spite of such concern, such hearsay was made a part of the search warrant affidavit, of subject here, even though the State did not feel it was sufficiently reliable to justify the issuance of a warrant when originally received some five (5) months prior to the occasion of this search.

At the meeting between the State and the petitioner, a day or so prior to the issuance of the subject search warrant, as corroborated in the trial transcript from the testimony of the petitioner and the representative of the State, the Department of Revenue made a request of the petitioner to voluntarily permit it to remove the financial and business records of the

petitioner to its headquarters to complete the civil audit. The petitioner refused, citing it could not properly operate its business with such records taken from the premises, which it, nevetheless, thought was highly unusual, but agreed the State could continue to use its premises to complete its audit, as it has so done for some five (5) months. In just a day or so after that meeting, the subject search warrant was served, and the records, which the State had requested the taxpayer to voluntarily relinquish, were taken from petitioner's premises by means of the subject search warrant.

Also, as the transcript of the trial court verifies, at no time did the taxpayer ever refuse access to the Department of Revenue of any records, documents or other financial information material requested. In fact, the State had full access to all information and had been using the exact information it seized pursuant to criminal process, for many months prior in the civil audit.

The subject search warrant also is impermissibly general, which allowed unfettered discretion of the State, as it was not limited as to time and there was no description as to what specific records were to be seized. It did not contain any guidelines to aid in the determination of what may or may not be seized. Because the State had access to all of petitioner's records for many months prior to the seizure, precise description of what was to be seized was available to it, rather than a mere generic description. The results of the civil investigation, at that point, should have been used to refine the warrant. Rather, fifty (50) boxes of records, constituting all of petitioner's financial records and documents, unlimited in time or scope, were seized. (Please see Appendix #1, a copy of the Search Warrant, and Appendix #2, an inventory of the seized documents and records.)

Subsequent to the unlawful and unconstitutional seizure of property by the

State of Louisiana, Department of Revenue and Taxation, from petitioner, a motion to release the seized property and to declare the search as unconstitutional, was filed. After testimony was taken from the petitioner and the State, the trial court, after permitting the State time to file a brief in support of its position, ruled in favor of petitioner, declaring the property had been unlawfully seized, contrary to Article 1, §5 of the Constitution of the State of Louisiana and the 4th Amendment to the Constitution of the United States. (Please see Appendix #3.) Thereafter, the Department of Revenue applied for a writ to the 1st Circuit Court of Appeals, said application being granted on the 19th day of January, 1990, which was made peremptory, vacating the trial court's ruling in behalf of the appellant. The 1st Circuit Court of Appeals, as can be seen from a review of that ruling attached hereto in the appendix, stated:

> "Under the totality of the circumstances analysis, the affidavit in support of the search warrant sets

> forth sufficient information to establish probable cause to believe the crime of willful evasion of sales tax had been, and was being committed. Additionally, much of the information provided by the confidential informant was corroborated by field auditors. ..." (Please see Appendix #4.)

Subsequent to that decree, the petitioner perfected an application for Writ of Certiorari and/or Review, under docket number 90-KK-0319 to the Supreme Court of Louisiana. That application was denied, 5-1 vote, on March 30, 1990. (Please see Appendix #5.)

It is from that ruling this petition for Writ of Certiorari to the Supreme Court of the United States of America, in conformity with Rule 21 of the Court's rules, this application is made.

H.

Raising of Federal Questions in Lower Courts

The federal questions sought to be reviewed through this petition were raised by

petitioner, initially, in the trial court, and again in the 1st Circuit Court of Appeal for the State of Louisiana and before the Supreme Court of Louisiana. They were raised by the petitioner in its "Motion to Release Seized Property", filed September 12, 1989, in the 19th Judicial District Court of Louisiana (please see Appendix #6). Such were passed upon by the trial court in its "Judgment on Motion to Release and Return Seized Property" (please see Appendix #3) rendered on October 18, 1989, and signed on October 19, 1989. Such ruling stated in part:

"... the records, documents and all other items or property seized by the State of Louisiana as a result of the execution of a search warrant dated August 31, 1989, were seized unlawfully and in violation of Article 1, §5 of the Constitution of the State of Louisiana; the Fourth Amendment to the Constitution of the United States... Further, that said search was

unlawful and violative of Article 1, §5 of the Louisiana Constitution and the FourthAmendment to the Constitution of the United States. ..."

I.

Argument and Summary

The Fourth Amendment to the Constitution of the United States, as well as, Article 1, §5 of the Constitution of Louisiana, demand probable cause of the existence of a crime or criminal conduct to exist before the issuance of a search warrant is constitutionally valid. Further, each also require for the things to be seized to be described particularly for a valid warrant to exist. Although much has changed, in constitutional law, in recent years determining what constitutes probable cause and the basis for determining relevancy under the so-called "totality of circumstances" analysis, the fundamental requirement of the necessity of facts and circumstances sufficient to support a reasonable belief that an offense has been

committed and that evidence or contraband may be found at the place to the searched, continues to be paramount.

In this matter, while the trial court had no problem dismissing the warrant because of the affidavit in its support did not meet any of the above principles, the 1st Circuit Court of Appeals of Louisiana found otherwise, relying on a supposed application of the totality of circumstances approach to find probable cause by joining the two defective and lacking portions of the affidavit to create a supporting one. While a court certainly can look to the total circumstance and each part of the affidavit to determine if probable cause exists, the combination of defective probable cause statements do not engender a healthy and constitutionally valid one sufficient to support the issuance of a warrant.

This matter, decided contrary to the finding of the trial court, is inconsistent with

other state courts of last resort and federal courts of appeal, ruling upon similar questions. The 1st Circuit Court of Appeals of Louisiana was incorrect in its application and understanding of the "totality of circumstances analysis", and failed to apply basic legal principles mandated to be considered in such application. Further, it somehow found "willful tax evasion had been, and was being committed from the language contained in the defective affidavit. The following, then, sets forth the correct application of such analysis and the other high courts which have ruled on similar matters contrary to the Louisiana decision in this matter.

The "totality of circumstances" test of **Illinois v. Gates**, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 527 (1983) replaced the "two prong" test of **Aguilar v. Texas**, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964) and **Spinelli v. United States**, 393 U.S. 410, 89

S.Ct. 584, 21 L.Ed. 2d 637 (1969) in determining whether information from a confidential informant established probable cause. The veracity, reliability and basis of knowledge of facts recital of the informant continue, under the new law, to be "relevant" factors in the totality of circumstances, rather than controlling factors. And, as in **Illinois v. Gates**, supra, independent police investigation is important to corroborate the details of an informant's tip in applying this test.

While probable cause can be based on knowledge supplied to a law enforcement officer by another person, even if the identity of the informant is confidential, probable cause to search exists when the facts and circumstances are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched. **Illinois v. Gates**, supra. There can be no question, in this matter, the

portion of the search warrant affidavit relating to the hearsay statements of the informant, are insufficient for probable cause, standing alone (please see appendix #1-A), as it lacks any articulation, whatsoever, concerning veracity, reliability or basis of knowledge.

Granted, when, as in this matter, the confidential informant's tip alone is insufficient, probable cause may still be shown if independent investigation by a government agency yields information consistent with and corroborative of the informer's tip. **Illinois v. Gates**, supra; **U.S. v. Schultz**, 436 F.Supp. 533 (D.C. Tex. 1977); **U.S. v. Jordan**, 530 F.2d 722 (C.A. Ky. 1976); **U.S. v. Trejo-Zambrano**, 582 F.2d 460; cert. den. **Fierio-Soza v. U.S.**, 99 S.Ct. 618, 439 U.S. 1005, 58 L.Ed.2d 682 (1978). But, at the very least, verification to a certain degree of an anonymous informant's tip, otherwise falling short of the constitutional standard, by the

government agent is required. U.S. v. Rodriguez, 835 F.2d 1090 (5th Cir. 1988). Even with the deference given to an judicial finding of probable cause by the issuing magistrate for issuance of a search warrant, failure to provide any indices of reliability for source and information when the basis, as here, is hearsay, is fatal to the warrant. People v. Fromen, 510 N.Y.S.2d 384, 125 A.D.2d 987, appeal denied 507 N.E.2d 1097, 69 N.Y.2d 880, 515 N.Y.S.2d 1027 (1986). The requirement that a magistrate must find some minimum, reasonable showing that the informant was reliable and had a basis of knowledge, has not been replaced or surplanted by the totality of circumstances analysis. People v. Griminger, 524 N.E.2d 409, 71 N.Y.2d 635, 59 N.Y.2d 55 (1988). Additionally, a search warrant affidavit that is based in part on information from unidentified informant, as in this matter, must make clear the basis of

informant's knowledge and grounds on which affiant concluded the informant was credible or his information was reliable, if that information is used in determining whether the affidavit establishes probable cause. U.S. v. Laws, 808 F.2d 92, 25 U.S. App. D.C. 197 (1986).

The Louisiana appeal court applied the totality of circumstances analysis directly opposite to the above federal circuit courts and other state courts of last resort. In this matter, the inherently defective hearsay information of the undisclosed informant was taken into consideration to find probable cause, even though it lacked the most rudimentary compliance with constitutional standards. Even the second paragraph of the purported probable cause portion of the affidavit does not bolster the defects in the confidential informant's assertions, nor does it make any accusation or articulation of "willful evasion of sales tax"

as set forth in the Court of Appeals decision (Appendix #4). Such general language with no attributions to a crime cannot be sufficient under the totality of circumstances to support probable cause.

LSA-R.S. 47:§1641 and §1642 each require the elements of willfulness and intent to defraud to support a finding of a violation of those tax penalty statutes in Louisiana. "Willfully" cannotes a voluntary, intentional violation of a known legal duty. An accused, in such situation, must have a specific intent to violate the law. "Carelessness" is not sufficient to constitute willfulness. **Buttermore v. U.S.**, 180 F.2d 853 (6th Cir. 1950); **Armstrong v. U.S.**, 228 F.2d 764 (8th Cir. 1956); **U.S. v. Burton**, 737 F.2d 439, 84-2 USTC ¶9689 (5th Cir. 1984). Such consideration demands the accused must have an evil motive and want of justification for his actions in finding willfulness in a tax setting.

U.S. v. Bishop, 412 U.S. 346, 36 L.Ed.2d 941, 93 S.Ct. 2008 (1973); State v. Main Motors, 838 So.2d 327 (La. 1979).

A review of Appendix #1-A, the search warrant affidavit, concerning the purported corroboration of the undisclosed informant's information, the second paragraph, does not set forth or establish any basis upon which it could be reasonably determined a crime was or has occurred, willful evasion of sales tax has or was occurring, or that such statement verified the informant's tip, as required in the before cited cases and the wealth of others on this topic. There is no articulation, insinuation or even hint of criminality, notwithstanding wilfulness or intent to defraud. The mere alleged finding of a discrepancy in figures does not automatically, especially in a tax setting, attribute penal conduct. Such a conclusion just does not follow and the reasoning of the Louisiana court in this matter are in

contradiction to prevailing law. Therefore, as no articulation or assignment of criminal conduct is set forth in that portion of the warrant, it certainly could not be used to bolster a completely defective confidential informant's statement to support probable cause under the totality of circumstances analysis.

The Gates standards and that of the others set forth herein earlier, require at least a basis of showing of reliability, credibility and basis of knowledge of undisclosed informant's information, and when totally defective, as in this matter, corroboration by a government agent of the informant's allegations. Such does not exist here and the Louisiana decision is contrary to those decisions and that legal authority.

Secondly, the search warrant in this matter is overly broad, general and without precise description. The holding of the Louisiana courts in this regard is also contrary

to that of controlling federal decisions.

The landmark cases on this point, concerning the "particularity" requirement of the Fourth Amendment as applied to search warrants utilized during the investigatory stage of a tax case, as here, is **United States v. Cardwell**, 680 F.2d 75 (9th Cir. 1982) and **United States v. Spilotro**, 800 F2d 959 (9th Cir. 1986). The **Cardwell** case, especially, is on a close factual setting with the instant one. There, the taxpayer allowed full access of his records to the Internal Revenue Agents, some of which were incriminating, for a period of one month. The IRS commenced the audit because of an informant who alleged incorrect reporting of corporate income. The auditing revenue agent referred the case to the criminal division of IRS after concentrating on the accounts mentioned by the informant.

After the referral, the IRS sought a search warrant with a supporting affidavit,

generally recounting the informant's report and the information uncovered by the revenue agent. A warrant was issued authorizing authorities to seize all books and records of the corporation which were instrumentalities of violation of 26 U.S.C. §7201. Upon executing the warrant, 160 boxes containing 100,000 documents were seized. The taxpayer sought to suppress the seized materials, unsuccessfully until in the Circuit Court. That Court held, among other things, the following.

Only a warrant "particularly describing the place to be searched and the person and things to be seized" is valid, and distinguished a previous case on this topic decided in **Andersen v. Maryland**, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed. 26627 (1976). The **Cardwell** Court found the warrant before it to be overbroad, with no limiting language as to material to be seized and impermissibly general. That the affidavit supporting the warrant did

not limit its scope either and that government discretion was unfettered as to the records it could seize and that the warrant must contain some guidelines to aid the determination of what may or may not be seized.

Further, that under the totality of circumstances analysis in determining the validity of a warrant, one of the crucial factors to be considered is the information available to the government. Generic classifications of items to be seized are only acceptable when a more precise description is not possible.

As in the case at hand, the IRS in Cardwell had conducted a lengthy investigation before seeking the warrant. The results of the civil audit in Cardwell and here, were not used to refine the scope of the warrant. The Cardwell court did not believe there was a necessity for a massive re-examination of all records of the taxpayer to

justify the search warrant. The same is true in this case except the State had audited petitioner's records not for just one (1) months, but for five (5), before seizing all of them through a grossly overbroad, general, and unparticularized warrant (please see Appendix #1).

The Ninth Circuit Court of Appeals recently had the occasion to again consider this issue in **United States v. Stubbs**, 873 F.2d 210 (9th Cir. 1989), concerning the "particularity" requirement of the Fourth Amendment in search warrant used in the investigatory stage of a tax case, as here. It again held that without proper descriptions of catagories of items to search, the warrant, as in **Cardwell**, was invalid. Further, that the government in **Stubbs** failed to include more precise description of the records, even though it had obtained such specific information from former employees.

The Stubbs court set out four objections achieved by the requirement of particularity:

1. to prevent general warrants;

2. to prevent seizure of objects upon mistaken assumption that they fall within the magistrates authorization;

3. to prevent the issuance of warrants on loose, vague, or doubtful basis of facts; and,

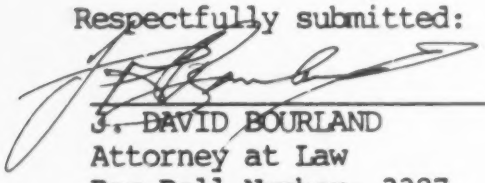
4. to advise the person whose premises are subject to search what items the officers are entitled to seize.

These cases, and their supporting authority, squarely fall within the setting of this matter. The agents had some five (5) months to review all of petitioner's records. There was no basis ever shown why the necessity of a warrant should follow after that period and initial results had been arrived at by them. Nor, why all of petitioner's records were necessary. The warrant does limit the seizure in any manner, not even by year or type of documents. (Please see Appendix #1.) The warrant in this case is even more general than

in Cardwell or Stubbs and the Louisiana decision concerning it certainly opposes the controlling law on this issue in federal courts. Anderson v. Maryland, 427 U.S. 463 (1976); Marron v. United States, 275 U.S. 192 (1927); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Rickert v. Sweeny, 813 F.2d 907 (8th Cir. 1987); United States v. Washington, 797 F.2d 146 (9th Cir. 1986); United States v. Hillyard, 677 F.2d 1336 (9th Cir. 1982); In the Matter of LaFayette Academy, 610 F.2d 1 (1st Cir. 1979); United States v. Abrams, 615 F.2d 541 (1st Cir. 1980). The initial suppression herein should have been upheld as the Louisiana Constitutional requirement under Article 1, §5 is identical to that of the Fourth Amendment concerning particularity. Yet, Louisiana has decided this

issue differently than the federal courts.

Respectfully submitted:



J. DAVID BOURLAND
Attorney at Law
Bar Roll Number: 3327
11017 Perkins Rd., Ste. C
Baton Rouge, LA 70810
Telephone: 504-767-0312

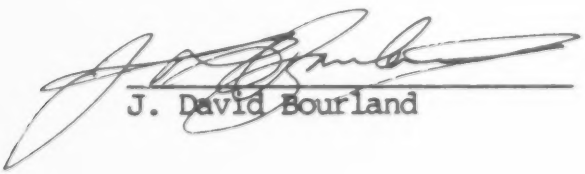
Certificate of Mailing

I hereby certify that a copy of the foregoing has this date been mailed, postage prepaid to:

Mr. Douglas Herbert
Attorney at Law
Department of Revenue and Taxation
Legal Division
P.O. Box 4064
Baton Rouge, LA 70821-4064

counsel of record.

BATON ROUGE, LOUISIANA, this 22 day of May, 1990.



J. David Bourland

J.

APPENDIX

Exhibit		Number
a.	Search Warrant	1
b.	Affidavit in Application for Search Warrant	1-A
c.	Trial Court Judgment to Release and Return Seized Property	2
d.	Decision of State of Louisiana First Circuit Court of Appeal	3
e.	Decision of the Supreme Court of Louisiana	4
f.	Motion to Release Seized Property ...	5
g.	Motion of Petition for Writ of Certiorari to United States Supreme Court	6

Petitioner's Exhibit

#1

SEARCH WARRANT

STATE OF LOUISIANA
EAST BATON ROUGE PARISH

To any peace officer in and for the Parish of East Baton Rouge:

An affidavit has been made before me upon the oath of Special Agent Diane Pfeifer of the Louisiana Department of Revenue and Taxation, alleging that the business located at 12393 Florida Boulevard, Baton Rouge, Louisiana 70815, is a place where:

> Banking records, general ledgers, sales tickets/invoices; cash register tapes; sales journals; sales ticket/invoice registers; account receivable records; Mastercard, Visa, American Express and Discover charge card records; gift certificate sales records; accounts payable records; electronic data storage devices; computer records and printout; any and all other records, notes and paper relating to the business of The Adobe Western and Casual, Inc.

are located, and affidavit submitted in support of this search warrant shows the necessary probable cause for is issuance. The purpose and reason for the search is to find and seize the items listed above.

YOU ARE HEREBY ORDERED to search the aforesaid business (Including all structures, desks, file cabinets, safes, vehicles, and other places of concealment on the premises where the things specified may be found) and if the things specified are found there, to seize them and hold them in safe custody pending further orders of the court. This shall be your warrant,

whereof you are to make due return according to law.

WITNESS my official signature this 31st day of August, 1989 at 2:05 o'clock P.M.

_____

JUDGE, 19TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
EAST BATON ROUGE PARISH

Petitioner's Exhibit

#1-A

AFFIDAVIT IN APPLICATION FOR SEARCH WARRANT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally appeared Special Agent Diane Pfeifer of the Louisiana department of Revenue and Taxation, Criminal Investigation Division, who, being first duly sworn, deposed and said that she has good reason to believe that located on/in the premises described as follows:

The Adobe Western & Casual, Inc.
12393 Florida Boulevard
Baton Rouge, Louisiana 70815

there is now located the following property which is evidence of the commission of an offense against the laws of the State of Louisiana:

Banking records; general ledgers; sales ticker/invoices; cash register tapes; sales journals; cash receipts journals; sales ticket/invoices registers; accounts receivable records; Mastercard, Visa, American Express and Discovery charge card records; gift certificate sales records; accounts payable records; electronic data storage devices; computer records and printouts; and and all other records, notes and papers relating to the business of The Adobe Western & Casual, Inc.

PROBABLE CAUSE IS BASED UPON THE FOLLOWING:

Affiant has been informed by a reliable, confidential informant that this business intentionally underreports its taxable receipts and underpays its sales tax liability, which is a violation of the Tax Laws of the State of Louisiana as set forth under Title 47 of the

Louisiana Revised Statutes. Informant states that this allegation can be verified by cash register tapes and sales invoices stored at The Adobe Western and Casual, Inc., 12393 Florida Boulevard, Baton Rouge, Louisiana 70815. Informant has witnessed the storage of cash register tapes and sales invoices at this address.

Civil authorities of the Louisiana Department of Revenue and Taxation are currently auditing The Adobe Western & Casual, Inc. The representative assigned by the corporation to work with the auditors has provided sales invoices. For the two months thus far examined, sales invoices provided are higher than amounts reported on the sales tax returns. The auditors further determined that approximately eight (8%) percent of invoices are missing, an indication that even higher amounts of additional sales tax liability exist. By comparing bank statements to sales tax returns and deposit receipts, auditors discovered over $100,000.00 in gross receipts from Discovery charge card sales which were not reported on the sales tax returns. The corporate representative claims that cash register tapes cannot be located. Auditors have seen boxes of accounting records in storage at The Adobe Western & Casual, Inc., 12393 Florida Boulevard, Baton Rouge, Louisiana 70815, and are currently examining those records which are made available at that location.

The undersigned officer requests a warrant to search the aforesaid business (including all structures, desks, file cabinets, safes, vehicles, and other places of concealment on the premises where the thing specified may be found located thereon) for the things specified in this affidavit.

_____

AFFIANT

SWORN TO AND SUBSCRIBED before me this 31st day of August, 1989.

_____

JUDGE, 19TH JUDICIAL DISTRICT COURT

Petitioner's Exhibit

#2

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

STATE OF LOUISIANA (THROUGH THE DEPARTMENT OF REVENUE AND TAXATION

NUMBER: 9-89-327

VERSUS

SECTION: III

THE ADOBE WESTERN & CASUAL, INC.

JUDGMENT ON MOTION TO RELEASE AND RETURN SEIZED PROPERTY

This matter came before the Court for hearing on October 3, 1989, pursuant to a Motion to Release and Return Seized Property filed on behalf of the defendant, The Adobe Western & Casual, Inc., on September 12, 1989.

Present: The Adobe Western & Casual, Inc., the defendant, through counsel of record; and,

The State of Louisiana through the Department of Revenue and Taxation through its attorney of record.

Considering the law, testimony, evidence, arguments of counsel, the court record, and for

reasons orally assigned, the court found that the records, documents and all other items or property seized by the State of Louisiana as a result of the execution of a search warrant dated August 31, 1989, and executed on September 5, 1989, were seized unlawfully and in violation of Article 1, §5 of the Constitution of the State of Louisiana; the Fourth Amendment to the Constitution of the United States, and further that custody of such seized property by the Department of Revenue and Taxation is in violation of Article 167(C) of the Code of Criminal Procedure of Louisiana. Further, that said search was unlawful and violative of Article 1, §5 of the Louisiana Constitution and the Fourth Amendment to the Constitution of the United States.

For these reasons, the motion of the defendant should be granted.

IT IS ORDERED, ADJUDGED AND DECREED that the motion filed in the above numbered and captioned matter by the defendant to release and

return to it the illegally seized property is hereby granted.

Judgment rendered October 19, 1989.

Judgment signed on the 19th day of October, 1989.

_____

JUDGE, 19TH JUDICIAL DISTRICT COURT

Petitioner's Exhibit

#3

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA
(THROUGH THE DEPARTMENT OF
REVENUE AND TAXATION

NO. KW 89 2137

VERSUS

JANUARY 19, 1990

THE ADOBE WESTERN AND CASUAL, INC.

In re: State of Louisiana applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, No 9-89-327.

JANUARY 19, 1990

WRIT GRANTED AND MADE PEREMPTORY:

Under the totality of the circumstances analysis, the affidavit in support of the search warrant sets forth sufficient information to establish probable cause to believe the crime of willful evasion of sales tax had been, and was being, committed. Additionally, much of the information provided by the confidential informant was corroborated by field auditors.

The trial court's ruling is hereby vacated, and the matter remanded for the purpose of a hearing to determine the disposition of the seized property under LA. C.Cr.P. art. 167.

MAL
HJC
FF

JANUARY 19, 1990

COURT OF APPEAL, FIRST CIRCUIT

_____

CLERK OF COURT FOR THE COURT

Petitioner's Exhibit

#4

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA
(THROUGH THE DEPARTMENT OF
REVENUE AND TAXATION)

vs. NO. 90-KK-0319

THE ADOBE WESTERN AND CASUAL, INC.

IN RE: Adobe Western and Casual, Inc.; - Defendant(s); Applying for Writ of Certiorari and/or Review, Supervisory and/or Remedial Writs; to the Court of Appeal, First Circuit, Number KW89 2137; Parish of East Baton Rouge 19th Judicial District Court Div. "F" Number 9-89-327

March 30, 1990

Denied.

HTL

WFM

JLD

JCW

LFC

CALOGERO, J., would grant the writ.

Supreme Court of Louisiana
March 30, 1990

Clerk of Court For the Court

Petitioner's Exhibit

#5

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

STATE OF LOUISIANA
(THROUGH THE DEPARTMENT OF
REVENUE AND TAXATION)

NUMBER:_____

VERSUS

DIVISION:_____

THE ADOBE WESTERN & CASUAL, INC.

MOTION TO RELEASE SEIZED PROPERTY
(Date of Seizure: 9/5/89)

NOW INTO COURT, through undersigned counsel, comes **The Adobe Western & Casual, Inc.**, a Louisiana corporation, who moves for the release of unlawfully seized property and records belonging to it for the following reasons:

I.

On or about the 5th day of September, 1989, agents of the Criminal Investigation Division of Louisiana Department of Revenue and Taxation executed a search warrant, Exhibit "A" attached hereto, on the movant at its business

address located at 12393 Florida Boulevard, Baton Rouge, Louisiana.

II.

Said warrant was issued without a basis as required under Article 161 of the Code of Criminal Procedure and also without probable cause as required under Article 162 of the Code of Criminal Procedure of Louisiana.

III.

As the supporting affidavit of the warrant is insufficient under the Constitution of Louisiana and the Constitution of the United States, and the said warrant was executed without probable cause, all items seized and improperly taken from the premises of the movant should be released and returned, immediately. (See attached Exhibit "B", "Affidavit in Application for Search Warrant".)

IV.

The property seized neither constituted contraband nor was seized incident to a lawful arrest.

NOW THEREFORE, it is prayed and moved that the property and records taken and seized from the premises of the movant pursuant to the attached search warrant be released to their lawful owner, The Adobe Western & Casual, Inc.

By Attorney:

J. DAVID BOURLAND
Attorney at Law
Bar Roll Number: 3327
11017 Perkins Road
Suite C
Baton Rouge, LA 70810
Phone: (504) 767-0312

ORDER

Considering the foregoing motion:

IT IS HEREBY ORDERED that the State of Louisiana, through the Department of Revenue and Taxation, show cause on the 3rd day of October, 1989, at 9:30 o'clock A.M. why the foregoing motion should not be granted.

DONE AND ORDERED at Baton Rouge, Louisiana, this /s/ day of /s/, 1989.

/s/
JUDGE, 19TH JUDICIAL
DISTRICT COURT

NOTICE INSTRUCTION FOR HEARING:

Please serve:

1. The State of Louisiana through the
Department of Revenue and Taxation
330 North Ardenwood Drive
Baton Rouge, Louisiana

2. The Honorable H. M. "Mike" Cannon
Clerk of Court
19th Judicial District
222 St. Louis Street
Baton Rouge, Louisiana

Petitioner's Exhibit

#6

SUPREME COURT OF LOUISIANA

NO. 90-KK-0319

STATE OF LOUISIANA
(THROUGH THE DEPARTMENT OF REVENUE)

VERSUS

THE ADOBE WESTERN & CASUAL, INC.

NOTICE OF PETITION

FOR WRIT OF

CERTIORARI TO THE

UNITED STATES SUPREME COURT

APPEAL COUNSEL:

J. DAVID BOURLAND
Attorney at Law
Bar Roll Number: 3327
11017 Perkins Rd., Ste. C
Baton Rouge, LA 70810
Telephone: 504-767-0312

Attorney for Defendant/
Appellant, The Adobe
Western & Casual, Inc.

NOTICE

NOW INTO COURT, comes defendant/appellant, The Adobe Western & Casual, Inc., by and through undersigned counsel, and pursuant to Rules 10; 11; 15; and, 21 of the Rules of The Supreme Court of The United States, notice is hereby given of application for certiorari of this matter to the Supreme Court of the United States.

Writ of Certiorari and/or Review, Supervisory and/or Remedial Writs, were denied on the 30th day of March, 1990, by this honorable court. This matter was on appeal to it from the First Circuit Court of Appeal of Louisiana under number kw89-2137, and on appeal from the 19th Judicial District Court, Division "F", under 9-89-327, as set forth in the attached decision of the before stated date.

Respectfully submitted:

_____

J. DAVID BOURLAND
Attorney at Law
Bar Roll Number: 3327

11017 Perkins Rd., Ste. C
Baton Rouge, LA 70810
Telephone: 504-767-0312

Attorney for Defendant/
Appellant, The Adobe
Western & Casual, Inc.

Supreme Court, U.S.
FILED
SEP 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-78

In The

Supreme Court of the United States

October Term, 1990

THE ADOBE WESTERN & CASUAL, INC.,

Petitioner,

versus

STATE OF LOUISIANA
(THROUGH THE DEPARTMENT OF REVENUE
AND TAXATION),

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

BRIEF ON BEHALF OF LEON R. TARVER II, SECRETARY DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARLON V. HARRISON
General Counsel
Attorney for State of Louisiana
Department of Revenue and
Taxation
Bar Roll Number 1409
Post Office Box 4064
Baton Rouge, Louisiana
70821-4064
Telephone: (504) 925-7630

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

A.

QUESTION PRESENTED FOR REVIEW

Should this Court overturn or modify the decision of the Louisiana State Supreme Court in *State of Louisiana through the Department of Revenue and Taxation vs. The Adobe Western & Casual, Inc.*, No. 8-KK-0319, which affirmed the decision of the Louisiana First Circuit Court of Appeals in Suite No. KW-89-2137, in which the First Circuit Court of Appeals held that under the "totality of circumstances analysis", the affidavit in support of the search warrant set forth sufficient information to establish probable cause to believe the crime of willful evasion of sales tax had been, and was being, committed since much of the information provided by the confidential informant was corroborated by Field Auditors?

B.

LIST OF ALL PARTIES

The State of Louisiana through the Department of Revenue and Taxation
Marlon V. Harrison, General Counsel
Legal Division
Post Office Box 4064
Baton Rouge, Louisiana 70821-4064
Telephone: (504) 925-7630
Bar Roll Number: 1409

The Adobe Western and Casual, Inc.
J. David Bourland
Attorney for Petitioner
Bar Roll Number: 3227
11017 Perkins Rd., Ste. C
Baton Rouge, Louisiana 70810
Telephone: (504) 767-0312

C.

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F. REASONS FOR DENYING THE WRIT..... 4
G. APPENDIX..... App. 1

D.

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2. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2318, 76 L. Ed. 527 (1983).....4, 6

3. *State v. Paceira*, 390 So.2d 681 (1974)..... 4

4. *State v. Rodriguez*, 476 So.2d 503 (1985).....7

5. *State v. Tallie*, 337 So.2d 504 (1976).....7

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7. *U.S. v. Norella*, 849 F.2d 33 (1988)..... 6

8. *U.S. v. Shields*, 732 F.Supp. 569 (1989).....5, 6

CONSTITUTION AND LOUISIANA TAX LAWS

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2. R.S. 47:1641 et seq.....*

3. Code of Criminal Procedure Article 167.....3

E.

STATEMENT OF THE CASE

In March, 1989, the Criminal Investigation Section of the Louisiana Department of Revenue and Taxation (hereinafter "the Department") was contacted by a confidential informant regarding information on Adobe Western and Casual, Inc. (hereinafter "Adobe") with reference to underreporting taxable receipts. Agent, Diane Pfeifer, was assigned to the case and thereafter, contacted the confidential informant. Agent Pfeifer interviewed the informant and obtained information regarding the business practices of Adobe. The information obtained by Agent Pfeifer from the interview specifically indicated with particularity that Adobe was in fact intentionally underreporting its taxable receipts and under paying sales tax imposed by the State Tax Laws of Louisiana.

The informant specifically indicated with particularity in the interview that the underreporting and under paying of sales tax liability could be verified by cash register tapes and sales invoices stored at one of Adobe's business locations and, indicated that personal knowledge was attained regarding the storage of those documents at a particular business location.

Following the interview, Agent Pfeifer consulted with appropriate personnel at the Department and, as a result of that, the Department's Field Audit Division conducted an audit examination of the books and records of Adobe's business. An audit was conducted by the Field Audit Division for the years, 1986 through May, 1989, and June, 1989. After conducting this audit examination for approximately sixty (60) days, the auditors found: (1) that

the sales invoices showed with consistency that the invoices contain higher amounts than reported as gross sales on the tax returns, (2) approximately eight percent (8%) of the invoices were missing, (which is an indication that even high amounts of additional sales tax liability exist), (3) by comparing the bank statements to the sales tax returns and deposit receipts, over $100,000 in gross receipts from discover charge cover sales had not been reported on the sales tax returns, and (4) the auditors saw boxes of accounting records in storage at the defendant's business premises as indicated by the informant.

Although the audit examination had been conducted by civil auditors, it was necessary to pursue this matter further in a criminal posture. Therefore, Agent Pfeifer then prepared an affidavit (Exhibit No. 1) and obtained a search warrant (Exhibit No. 2) on August 31, 1989. The warrant was executed on September 5, 1989 at which time numerous business records of Adobe were seized and taken into custody by the Department. These documents were held by the Department and examined thereafter, and were in the process of examination until Adobe filed a Motion to Release and Return the Seized Property. This motion was filed on September 12, 1989 in the 19th Judicial District Court. This motion was set for hearing on October 3, 1989, before the Honorable Frank J. Saia, Judge, 19th Judicial District Court. A hearing was held on that date and, after allowing fifteen (15) days for the filing of post hearing memoranda, on October 18, 1989, the court ruled that the seizure of business records of Adobe was illegal because the information stated in the affidavit did not sufficiently establish the credibility and reliability of the confidential informant, the affidavit did

not sufficiently set forth information stating whether or not criminal activity was going on at the place of business, and that the terms of the Louisiana Code of Criminal Procedure Article 167 were violated because the items seized were not brought before the court so that the court could determine the disposition of these items. (See Trial Court Judgment to Release and Return Seized Property Exhibit No. 3). Thereafter, the Department of Revenue applied for writ to the First Circuit Court of Appeal, said application being granted on the 19th day of January, 1990, which was made peremptory, vacating the trial court's ruling on behalf of the appellant (See Exhibit No. 4). The First Circuit Court of Appeal held:

> "Under the 'totality of circumstances analysis', the affidavit in support of the search warrant sets forth sufficient information to establish probable cause to believe the crime of willful evasion of sales tax had been, and was being committed. Additionally much of the information provided by the confidential informant was corroborated by field auditors."

Subsequent to that decree, the petitioner perfected an application for Writ of Certiorari and/or Review, under docket number 90-KK-0319 to the Supreme Court of Louisiana. That application was denied, 5-1 vote, on March 30, 1990. (Exhibit No. 5)

It is from that ruling that the petition for Writ of Certiorari to the Supreme Court of the United States of America, in conformity with Rule 21 of the Court's rules, that an application was made by Adobe. (Exhibit No. 6).

F.

REASONS FOR DENYING THE WRIT

The Department submits that the information obtained from the personal word of a reliable confidential informant, and the review of records by the Department's civil auditors was sufficient to establish probable cause to issue the warrant herein. In the instant case, the Department obtained information from a reliable confidential informant and had civil auditors examine the books and records of Adobe. After review of the records, the information from the auditors sufficiently corroborated the word of the confidential informant establishing that criminal activity was afoot, and therefore, a search warrant and a seizure pursuant to that warrant would produce evidence tendering to show the commission of an offense. In *State vs. Paceria,* 290 So.2d 681 (1974), the Supreme Court held that a valid search warrant was issued where information was obtained from a reliable confidential informant. Although the informant's information alone was not sufficient to establish probable cause, two police officers had placed the defendant under surveillance for seven hours prior to requesting the warrant that corroborated the information from the informant. The First Circuit Court of Appeal was correct in its application and understanding of the "totality of circumstances analysis", and properly applied basic legal principles mandated to be considered in such application. The "totality of circumstances analysis" of *Illinois vs. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L. Ed. 527 (1983) replaced the "two prong" test of *Aguilar vs. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L.

Ed.2d 723 (1964) in determining whether information from a confidential informant established probable cause.

Adobe contends that the affidavit submitted for the warrant was insufficient for a magistrate's finding of probable cause. The argument focuses on the alleged lack of information as to the reliability of the informant, and the claimed insufficiency of the details about the criminal activity. It certainly can be argued that the reliability information in the affidavit is more conclusory than specific. But, the courts are no longer dealing with the two prong test of *Aguilar,* supra, rather we must now look at the totality of circumstances. The reliability of the informant's information was enhanced by the specificity and details the Field Audit Section acquired in its audit of Adobe. The auditor's review showed lack of consistency in reporting sales invoices, in addition to, a percentage of certain missing invoices coupled with the reconciliation of certain bank statements which did not, and were not reported on sales tax returns. This information was not conclusory, nor was it, as is sometimes the case, based on hearsay. A review of the affidavit convinced the trial judge that he had a substantial basis for concluding that probable cause existed. See *U.S. vs. Caggino,* 899 Fed.2d 99 (1990).

With respect to Adobe's argument that the search warrant's clause is over broad and insufficiently specific, the courts have held that a search warrant should keep with general requirements and should be interpreted practically, not hypertechnically. *See U.S. vs. Shield's Rubber Co.,* 732 Fed. Supp. 569 (1989). The warrant in this particular case permits the seizure of general ledgers, sales ticket invoices, cash register tapes, sales journals

copies, sales ticket invoice registers, accounts receivable records, all major credit card records, gift certificate sales records, accounts payable records, and any and all other records, notes and papers relating to the business of Adobe. No serious argument can be made that the items in the aforementioned categories are not described with sufficient particularity to allow an officer executing a search to decide with certainty whether an item was or was not to be seized. More importantly, the last general clause which allows any and all other records, notes and papers relating to the business to be seized does not in itself invalidate an otherwise proper search warrant. *U.S. vs. Shield's Rubber Co. Corp.*, supra.

Probable cause to search exists when the facts and circumstances are sufficient to support a reasonable belief that an offense has been committed and that the evidence of contraband may be found at the place to be searched. *U.S. vs. Nocella*, 849 F.2d 33 (1988). In this particular case, in addition to the confidential informant's information, the Department conducted an audit which at the very least verified to a very large degree the informant's tips and should be considered and was in fact considered by the trial judge in issuing the search warrant. Further, probable cause is a fluid concept, and its determination cannot be based on hard certainties and rigid rules. *Illinois vs. Gates*, supra. That court held:

> "In its place we reaffirm the totality-of-circumstances analysis that traditionally has informed probable cause determinations. The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity and the basis of

> knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to insure the magistrate had a substantial basis for concluding that probable cause existed."

The First Circuit Court of Appeals and the Supreme Court of the State of Louisiana both agreed that the magistrate had a "substantial basis" for concluding that probable cause existed, which is contrary to the District Court which clearly misapplied the law, and departed from a long line of jurisprudence in Louisiana. The courts in the State of Louisiana, specifically *State vs. Rodriguez*, 476 So.2d 503 (1985) hold that:

> "The task of the reviewing court in evaluating the search warrant affidavit is simply to insure that the Judge had a substantial basis for concluding that probable cause existed"

Obviously, the reviewing courts must give great deference to a magistrate's determination of probable cause. From the record, it appears that the trial court did not sufficiently respect such a determination. In the case of *State vs. Tallie*, 337 So.2d 504 (1976), the Court awarded such deference to a magistrate's determination. The Department submits that the information in the affidavit is correct and that the burden of proving that the representation of the affidavit by affiant is false is on Adobe.

The information provided by the confidential informant in connection with the review by the Department of the taxpayer's records by the civil auditors indicated that over a period of time, Adobe willfully and intentionally violated a known legal duty.

Although some findings of discrepancies and figures do not automatically, especially in a tax setting attribute penal conduct, systematic consistent deviation in reporting certain liabilities over an extended period of time for such large amounts of money compels the Department to assign some criminal conduct to such gross misrepresentations. In tax prosecution, it is absolutely necessary to have business documents and records in order to prove the commission of any type of offense. Without such records, no case can possibly be made. Thus, the State's request for a search warrant to seize the records of Adobe was absolutely necessary to prove the commission of an offense.

CONCLUSION

The trial court erred in holding that the warrant failed to state that the Department should have possession of the documents seized under the discretion of the court, that the warrant is substantially general, and that the Department should be ordered to return the records to the taxpayer. The Department has in fact returned the records pursuant to the order of the District Court. It is apparent that the taxpayer is pursuing this matter in order to regain information that the Department received as a result of that particular seizure. Even if this Honorable Court would determine that the seizure was incorrect, which the Department vigorously denies, the Department still had the authority to conduct a civil audit which it determined that certain monies are owed. At that particular point, the Department had a right to assess any penalties in its determination regarding that particular

audit and investigation. Because of the peculiar circumstances in this case, the Department determined that it would be in the best interest to go forward with a search warrant which was signed by a Judge. The Department did not abridge nor violate any constitutional right that Adobe had. Because of this, it is submitted that the 1st Circuit Court of Appeals and the Supreme Court are correct in determining that the Department did not violate any constitutional rights and this writ application should be denied.

Respectfully submitted:

/s/ Marlon V. Harrison
Marlon V. Harrison
General Counsel
Bar Roll Number: 1409
Attorney for State of Louisiana
Department of Revenue and Taxation
Post Office Box 4064
Baton Rouge, Louisiana 70821-4064
Telephone: (504) 925-7630

APPENDIX

Exhibit NUMBER

a. Affidavit..... App. 1

b. Search Warrant..... App. 4

c. Trial Court Judgment to Release and Return Seized Property..... App. 6

d. Decision of Louisiana 1st Circuit Court of Appeals..... App. 8

e. Motion for Writ of Certiorari to United States Supreme Court..... App. 10

f. Writ Applicator to State Supreme Court, writ denied..... App. 12

EXHIBIT A

AFFIDAVIT IN APPLICATION
FOR SEARCH WARRANT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally appeared Special Agent Diane Pfeifer of the Louisiana Department of Revenue and Taxation, Criminal Investigation Division, who, being first duly sworn, deposed and said that she has good reason to believe that located on/in the premises described as follows:

The Adobe Western and Casual, Inc.
12393 Florida Boulevard
Baton Rouge, Louisiana 70815

there is now located the following property which is evidence of the commission of an offense against the laws of the State of Louisiana:

Banking records; general ledgers; sales tickets/invoices/cash register tapes; sales journals; cash receipts journals; sales ticket/invoice registers; accounts receivable records; Mastercard, Visa, American Express and Discover charge card records; gift certificate sales records; accounts payable records; electronic data storage devices; computer records and printouts; any and all other records, notes and papers relating to the business of The Adobe Western and Casual, Inc.

PROBABLE CAUSE IS BASED UPON THE FOLLOWING:

Affiant has been informed by a reliable, confidential informant that this business intentionally underreports

its taxable receipts and underpays its sales tax liability, which is a violation of the Tax Laws of the State of Louisiana as set forth under Title 47 of the Louisiana Revised Statutes. Informant states that this allegation can be verified by cash register tapes and sales invoices stored at The Adobe Western and Casual, Inc., 12393 Florida Boulevard, Baton Rouge, Louisiana 70815. Informant has witnessed the storage of cash register tapes and sales invoices at this address.

Civil auditors of the Louisiana Department of Revenue and Taxation are currently auditing The Adobe Western and Casual, Inc. The representative assigned by the corporation to work with the auditors has provided sales invoices. For the two months thus far examined, sales invoices provided are higher than amounts reported on the sales tax returns. The auditors further determined that approximately either percent (8%) of invoices are missing, an indication that even higher amounts of additional sales tax liability exist. By comparing bank statements to sales tax returns and deposit receipts, auditors discovered over $100,000.00 in gross receipts from Discover charge card sales which were not reported on the sales tax returns. The corporate representative claims that cash register tapes cannot be located. Auditors have seen boxes of accounting records in storage at The Adobe Western and Casual, Inc., 12393 Florida Boulevard, Baton Rouge, Louisiana 70815, and are currently examining those records which are made available at that location.

The undersigned officer requests a warrant to search the aforesaid business (including all structures, desks, file cabinets, safes, vehicles, and other places of concealment

on the premises where the things specified may be found located thereon) for the things specified in this affidavit.

/s/ Diane Pfeifer
AFFIANT

SWORN TO AND SUBSCRIBED before me this 31st day of August, 1989.

/s/ Diane Pfeifer
JUDGE, 19TH JUDICIAL
DISTRICT COURT

EXHIBIT B

SEARCH WARRANT

STATE OF LOUISIANA
EAST BATON ROUGE PARISH

To any peace officer in and for the Parish of East Baton Rouge:

An affidavit has been made before me upon the oath of Special Agent Diane Pfeifer of the Louisiana Department of Revenue and Taxation, alleging that the business located at 12393 Florida Boulevard, Baton Rouge, Louisiana 70815, is a place where:

> Banking records; general ledgers; sales tickets/ invoices; cash register tapes; sales journals; sales ticket/invoice registers; accounts receivable records; Mastercard, Visa, American Express and Discover charge card records; gift certificate sales records; accounts payable records; electronic data storage devices; computer records and printouts; any and all other records, notes and papers relating to the business of The Adobe Western and Casual, Inc.

are located, and affidavit submitted in support of this search warrant shows the necessary probable cause for its issuance. The purpose and reason for the search is to find and seize the items listed above.

YOU ARE HEREBY ORDERED to search the aforesaid business (Including all structures, desks, file cabinets, safes, vehicles, and other places of concealment on the premises where the things specified may be found) and if the things specified are found there, to seize them and hold them in safe custody pending further orders of the

court. This shall be your warrant, whereof you are to make due return according to law.

WITNESS my official signature on this 31st day of August, 1989 at 2:05 o'clock P.M.

/s/ Fred Pitcher
JUDGE, 19TH JUDICIAL
DISTRICT COURT
STATE OF LOUISIANA
EAST BATON ROUGE PARISH

EXHIBIT C

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

STATE OF LOUISIANA (THROUGH THE DEPARTMENT OF REVENUE AND TAXATION)

VERSUS

THE ADOBE WESTERN & CASUAL, INC.

NUMBER: 9-89-327

SECTION: III

JUDGMENT ON MOTION TO RELEASE AND RETURN SEIZED PROPERTY

This matter came before the Court for hearing on October 3, 1989, pursuant to a Motion to Release and Return Seized Property filed on behalf of the defendant. The Adobe Western & Casual, Inc., on September 12, 1989.

Present: The Adobe Western & Casual, Inc., the defendant, through counsel of record; and,

The State of Louisiana through the Department of Revenue and Taxation through its attorney of record.

Considering the law, testimony, evidence, arguments of counsel, the court record, and for reasons orally assigned, the Court found that the records, documents and all other items or property seized by the State of Louisiana as a result of the execution of a search warrant dated August 31, 1989, and executed on September 5,

1989, were seized unlawfully and in violation of Article 1, §5, of the Constitution of the State of Louisiana; the Fourth Amendment to the Constitution of the United States, and further that custody of such seized property by the Department of Revenue and Taxation is in violation of Article 167(C) of the Code of Criminal Procedure of Louisiana. Further, that said search was unlawful and violative of Article 1, §5 of the Louisiana Constitution and the Fourth Amendment to the Constitution of the United States.

For these reasons, the motion of the defendant should be granted.

IT IS ORDERED, ADJUDGED AND DECREED that the motion filed in the above numbered and captioned matter by the defendant to release and return to it the illegally seized property is hereby granted.

Judgment rendered October 18, 1989.

Judgment signed on the 19th day of October, 1989.

/s/ Frank J. Saia
JUDGE, 19TH JUDICIAL
DISTRICT COURT

EXHIBIT D

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA (THROUGH THE DEPARTMENT OF REVENUE AND TAXATION)	NO. KW 89 2137
VERSUS	
THE ADOBE WESTERN AND CASUAL, INC.	JANUARY 19, 1990

In re: State of Louisiana applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, No. 9-89-327.

JANUARY 19, 1990

WRIT GRANTED AND MADE PEREMPTORY:

Under the totality of the circumstances analysis, the affidavit in support of the search warrant sets forth sufficient information to establish probable cause to believe the crime of willful evasion of sales tax had been, and was being, committed. Additionally, much of the information provided by the confidential informant was corroborated by field auditors.

The trial court's ruling is hereby vacated, and the matter remanded for the purpose of a hearing to

determine the disposition of the seized property under La. C.Cr.P. art. 167.

MAL
HJC
FF

JANUARY 19, 1990

COURT OF APPEAL, FIRST CIRCUIT

/s/ Stanley P. Lemoine
CLERK OF COURT
FOR THE COURT

EXHIBIT E

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA
(THROUGH THE DEPARTMENT OF
REVENUE AND TAXATION) NO. 90-KK-0319

VS.

THE ADOBE WESTERN AND
CASUAL, INC.

IN RE: Adobe Western and Casual Inc.; – Defendant(s); Applying for Writ of Certiorari and/or Review, Supervisory and/or Remedial Writs; to the Court of Appeal, First Circuit, Number KW89 2137; Parish of East Baton Rouge 19th Judicial District Court Div. "F" Number 9-89-327

March 30, 1990

Denied.

HTL

WFM

JLD

JCW

LFC

CALOGERO, J., would grant the writ.

Supreme Court of Louisiana
March 30, 1990

/s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

EXHIBIT F

SUPREME COURT OF LOUISIANA

NO. 90-KK-0319

STATE OF LOUISIANA
(THROUGH THE DEPARTMENT OF REVENUE)

VERSUS

THE ADOBE WESTERN & CASUAL, INC.

NOTICE OF PETITION

FOR WRIT OF

CERTIORARI TO THE
UNITED STATES SUPREME COURT

APPEAL COUNSEL:

/s/ J. David Bourland
J. DAVID BOURLAND
Attorney at Law
Bar Roll Number: 3327
11017 Perkins Road, Suite C
Baton Rouge, Louisiana 70810
Telephone: 504-767-0312

Attorney for Defendant/
Appellant
The Adobe Western & Casual, Inc.

NOTICE

NOW INTO COURT, comes defendant/appellant, The Adobe Western & Casual, Inc., by and through undersigned counsel, and pursuant to Rules 10; 11; 15; and, 21 of the Rules of The Supreme Court of The United States, notice is hereby given of application for certiorari of this matter to the Supreme Court of the United States.

Writ of Certiorari and/or Review, Supervisory and/or Remedial Writs, were denied on the 30th day of March, 1990, by this honorable court. This matter was on appeal to it from the First Circuit Court of Appeal of Louisiana, under number KW89-2137, and on appeal from the 19th Judicial District Court, Division "F", under 9-89-327, as set forth in the attached decision of the before stated date.

Respectfully submitted,

/s/ J. David Bourland
J. DAVID BOURLAND
Attorney at Law
Bar Roll Number: 3327
11017 Perkins Road, Suite C
Baton Rouge, Louisiana 70810
Telephone: 504-767-0312

Attorney for Defendant/
Appellant
The Adobe Western & Casual,
Inc.

CERTIFICATE

I hereby certify that a copy of the foregoing has this date been mailed, postage prepaid to:

Mr. Douglas Herbert, counsel of record,
Attorney at Law
Department of Revenue and Taxation
P.O. Box 4064
Baton Rouge, LA 70821-4064

Honorable Frank J. Saia
Judge, 19th Judicial District Court
6th Floor, Governmental Building
222 St. Louis Street
Baton Rouge, LA 70802

Honorable Stanley Lemoine
Clerk, First Circuit Court of Appeal
Room 902, Governmental Building
222 St. Louis Street
P.O. Box 4408
Baton Rouge, LA 70821-4408.

BATON ROUGE, LOUISIANA, this 1 day of May, 1990

/s/ J. David Bourland
J. David Bourland